No. 21532

In The
United States Court of Appeals
For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLEE

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SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

TABLES OF AUTHORITY (cont'd)

Statutes

Annotations & Textbooks

Other Authority

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on November 4, 1966, by the United States District Court for the District of Alaska, at Fairbanks. Notice of Appeal was filed on November 28, 1966.

The complaint alleged that the District Court had jurisdiction by virtue of 28 U.S.C.A. 1332 on the ground of diversity of citizenship and that the amount in controversy was in excess of $10,000. (R.1., Complaint, para I.) Plaintiff was alleged to be a corpo-

ration organized and existing under the laws of the State of Alaska and defendant was alleged to be a corporation organized under the laws of the State of Washington. The answer admitted the jurisdictional allegations. (R. 50, para I). The District Court found in accordance with the jurisdictional allegations of the complaint.

This Court has jurisdiction under 28 U.S.C.A. 1291 because it is an appeal from a final decision of a district court of the United States.

STATEMENT OF THE CASE

On April 12, 1961, appellee was awarded a contract by the Corps of Engineers to construct eight family quarters units at Ft. Greely, Alaska. The contract price was $1,964,503 (Ex. 1-A,-B, Finding No. 2). The contract completion date was January 8, 1962. (Ex. 1-C, — 1-D, p. SC-1.)

Several days later appellant accepted a purchase order to furnish appellee with the lumber requirements for the project. (Finding No. 3). Included in this order was 1,856 sheets of 4′ x 8′ Type II 3/8″ grooved siding. (Finding No. 4) Prior to acceptance of the purchase order, appellant's representatives were notified of the contract specifications for the plywood, (Finding No. 4), and that it was a critical item which appellee had to have immediately because the contract completion date required that the buildings be closed in before the cold weather set in. (T.

18-19) In addition to being necessary for closing in the buildings, the extra plywood was "the only structural strength. There was no bracing." (T. 117). At the time it accepted the order appellant knew of the shipping delays for transportation of building materials to Alaska and the seasonal construction schedule which prevailed there. (T. 405-406).

Appelle's general superintendent, Edgar J. Billimek, arrived on the job site about April 15, and undertook preliminary efforts in readying the construction work for performance. He had prepared a plan for prosecuting the work and construction schedules for subcontractors and the Corps of Engineers. (Finding Nos. 23 and 24. Ex. 1-F, G). The schedules were designed to have the buildings on the project closed in before the arrival of cold weather in the fall. Application of the exterior siding was to begin on June 1 with Building 846, 847, and 848 and be completed on all buildings by August 5. Completion of the last items of building construction was scheduled for October 31. (T. 109, 110, 457, 458).

The construction schedule and plan of work were developed in order to obtain maximum efficiency in the prosecution of the work. The work plan provided that the second floor siding would be applied while the second story walls were lying in a horizontal position so that the entire completed wall could be raised as an integral unit. (T. 113, 382, 384-386). This technique speeded up construction and was the most eco-

nomical means of installing the second story framing and siding. (T. 113-114. Finding No. 32). It had been successfully used by appellee on a similar project the previous year. (T. 382).

Excavation and earth work was commenced as scheduled about May 4 and continued throughout May. Some delay occurred in excavation because of frozen subsoil, but by May 20, the ground was thawed sufficiently to complete excavation and commence pouring the footings. Thereafter excavation, backfill and compaction proceeded normally. (T. 117-118, 123, 124. Ex. 46, Report No. 11-36).

Appellant delivered the plywood siding to the dock in Seattle on May 5 for trans-shipment to Alaska. (Ex. 3, 4. Answer to Request for admission No. 4 T. 405). It arrived at the job site on May 26 or 27. (Finding No. 5).

On about May 29, while construction was progessing normally, appellee's superintendent examined some of the plywood and questioned whether it met specifications. He immediately notified his Seattle office, which in turn contacted appellant's sales representative by telephone. The representative assured appellee that the plywood would meet specification. (T. 79-80. Ex. 9). By a letter dated June 1, appellee again notified appellant that the plywood appeared to be inferior and remarked that it hoped the plywood met specifications. Appellant again orally notified appellee not to worry about the specifications.

(T. 133, 334). Relying on these assurances, appellee went ahead with its plans to use the material.

During June, appellee increased its manpower on the job, (Ex. 46, Reports No. 36-61), and the job was progressing well. (T. 128, 387, 392, 430; Ex. 46, Reports No. 36-61). Framing commenced on Buildings 846, 847 and 848 during this period and siding was applied to them in the latter part of June. (T. 130). Some problems were encountered during June, but these did not materially hinder the work related to framing and closing in of the buildings. They were not of an unusual nature for this type of project and were correctable by putting on more men. (T. 130, 151, 160, 262, 387, 392, 433, 434).

On the afternoon of July 1, after appellee had begun installing the plywood, it was advised by a field memorandum from the project engineer that the material did not comply with specifications and would have to be removed and replaced by material meeting specifications. (Finding No. 5). Appellee's superintendent did not consider this memorandum to be a stop work order and continued on Monday, July 3, to apply the siding to buildings in progress. (T. 153-155. Finding No. 5).

On July 3, appellee was advised in writing by the resident engineer that the plywood was not acceptable and that all costs incurred in replacement of the siding would have to be borne by appellee. (Finding No. 6). On this date Buildings 846, 847 and 848 had

been fully sheathed and another building was partially enclosed. (T. 156, 281). The remaining buildings were in a stage of construction whereby siding would soon have been applied to them. (T. 157, 159, 160). Following receipt of the July 3 notice of rejection, appellee sorted the remaining plywood so as to be able to utilize those pieces apparently meeting specifications and continued application of the siding. (T. 161, 389, 430. Finding No. 7). Removal and reapplication of defective siding occurred to the extent possible. (T. 161).

Following a meeting at the job site, a settlement was reached under the terms of which appellant allowed appellee a credit of $2,000.00 to cover application and removal of the defective siding and for reloading and sorting the unused sheets on hand. (Finding No. 8). In addition, appellee agreed to replace the thirteen hundred defective sheets with material meeting specifications. (Finding No. 8).

Because of the large number of defective sheets in the shipment, appellees job plan was severely disrupted. Up to that time it "was going along real good." (T. 387, 471). From that time on appellee operated inefficiently in the overall prosecution of the work. Appellee "sort of started shifting things around. . . . We couldn't keep on operating as we figured, so the crew that was on the siding, we pulled them off and put them on something else trying to keep them busy. Our framing was up. We couldn't go beyond the second floor." (T. 159). "The whole

schedule was disrupted and nothing was going the way we had it planned. We operated very inefficiently, and that's about the scope of it." (T. 168). One of appellee's foremen, Ed Thompson, aptly described the opeartion as "just a hunt and peck sort of thing." (T. 391).

On August 3, the initial replacement shipment arrived at the job site. It contained 1300 sheets. The Corps of Engineers immediately notified appellee in writing that it considered most of this shipment defective. (Finding No. 9). Arrangements were made to have the shipment graded by a representative of the plywood division of Pittsburg Testing Laboratory. This was accomplished on August 8 and 9. (Finding No. 9). Out of the shipment of 1300 sheets, 610 were defective. (Finding No. 10).

The rejection of 47 percent of the initial replacement shipment further upset appellee's revised plans and caused additional delays and hinderances to the efficient prosecution of the work. "It just upset everything that we had planned at that stage." (T. 184). Appellee decided at this point to go forward with the framing of the remaining buildings in order to be able to place the roof trusses so as to minimize the losses resulting from the rejection of the replacement shipment and to ready the buildings for rapid closing when the next shipment arrived. (T. 189-190, 209, 210). As expressed by Billimek, "I think at that point I had to make up my mind I might as well bull the framing through and frame it all up

to the roofs, and just concentrate on getting the roofs on the buildings and forget about the siding." (T. 189). Crews were shifted around. "It wasn't very productive to switch back and forth, but it was better than laying them off and having to rehire them." (T. 186). Prosecution of the work in the sequence planned was important, according to Billimek, because maximum labor efficiency is obtained by utilizing the same crews on the same tasks throughout the project. "Whatever you start a crew on, it could be the framing, the joist crew putting the rafters up, the siding crew, you try to keep that crew on a particular job throughout the whole project, because if there is a problem it will be developed the first day and if there is something they are all familiar with it from then on, and there shouldn't be no more problems after they get lined out and know what they are doing." (T. 116).

The second replacement shipment arrived at the job site on August 23. (T. 210, Finding No. 11). It contained 610 sheets of which an unbelievable 225, or 37 per cent, were defective. (Finding No. 11). Further sorting was required; (T. 214); it had "never stopped." (T. 390). Appellee again undertook to replace the defective sheets in the second replacement shipment and on September 24, the third replacement shipment containing 225 sheets arrived at the job site. (Finding No. 12). These enabled appellee to complete enclosure of the structures.

Despite the fact that appellee's construction schedule called for the closing in of all of the buildings

by August 5, Ex. 1-F, they were closed in on approximately the following dates;

Building No.	*Date Closed-In*
848	August 9
847	August 30
846	August 31
855	September 5
877	September 6
876	September 9
875	September 13
821	October 7
856	September 9.

(Finding No. 17). This is significant in the light of the fact that by July 3, Buildings 848, 847, and 846 had already been enclosed and work on the remaining buildings was on schedule.

Contrary to appellant's assertions, the court did not find that there were always enough sheets available to the contractor to prosecute the work as planned. The trial court did find that "the evidence does not establish what delay, if any, lack of available suitable finding may have caused (appellee), (Finding No. 17). This finding was premised on the fact, as found by the court in Findings No. 13-17, that by use of satisfactory sheets from each shipment appellee could have enclosed more buildings following receipt of each shipment than it did. Also bearing on the finding that appellee failed to sustain its burden of proof on the issue of damages for delay were the findings that

the project suffered from delays not related to the siding. (Finding No. 28). Although there was unrebutted testimony that none of the delays specified in Findings No. 28 and 29 delayed closing in of the buildings or materially delayed completion of the project, (T. 223-230, 151), appellee does not challenge the findings as "clearly erroneous." The causal relationships are simply too interwoven to permit such a contention, at this stage of the proceedings.

The Court further found, however, that "by reason of the fact that the plywood siding supplied by (appellant) did not meet contract specifications, it became necessary for (appellee) to revise its plan of work by erecting the framing and thereafter applying the plywood siding by craftsmen working from scaffolding." (Finding No. 32). This change in the plan of work, the court found, increased the cost of applying a sheet of plywood siding about three times. (Finding No. 32).

Damages of $26,000.00 were awarded as a result of the required changes in the plan of work. (Finding No. 35).

They were computed as follows:

$10.00 per man hour per workman

3 man hours — $30.00 sheet

1300 sheets x $30.00 = $39,000.00

(Finding No. 34). The cost of $30.00 for application of each of the 1300 sheets of plywood took into con-

sideration the costs of sorting the plywood, transporting it from the sorting stockpile to the building site, loading and unloading it, delivery to carpenters for application, and installation. Finding No. 34-A. Two-thirds of the total cost of applying the remaining 1300 sheets was the result of the revision of the work plan. (Finding No. 35).

Judgment was accordingly entered in favor of appellee for $26,000, together with several other relatively minor items of damage, less an offset of approximately $10,000 over which there was no dispute. This appeal followed.

SUMMARY OF ARGUMENT

Appellant's grounds for appeal are predicated on the insufficiency of the evidence to support findings made by the lower court. Each finding assailed by appellant is supported by the evidence; none is "clearly erroneous."

Appellee was unquestionably damaged by appellant's incredible lack of performance. Determination of the amount of damage was difficult. In these circumstances the trial judge has "wide latitude" in assessing damages and appellant "is not entitled to complain that (the damages) cannot be measured with the same exactness and precision that would otherwise be possible."

ARGUMENT

Appellant's first contention is that the trial court

"affirmatively found" that there was always adequate suitable plywood on the project, and therefore appellee was not damaged by appellant's failure to supply siding meeting specifications. (Appellant's brief, 8-9).

The trial court did not find that there was sufficient siding on the project at all times. It found only that "the evidence (did) not establish the delay, if any, caused by lack of suitable plywood." (Finding No. 17). The court simply found that following each shipment, by utilization of all the acceptable sheets from the shipment, appellee could have enclosed more buildings than it did. (Finding Nos. 13-17). This is not equivalent to a finding that there was always suitable plywood on the site to enable appellee to prosecute the work as originally planned; it is a determination that appellee did not sustain its burden of establishing damages for delay, as distinguished from damages for loss of efficiency and productivity. The court obviously felt that the non-plywood related delays to the project, as set forth in Findings No. 28 and 29, coupled with the difficulties in determining whether the project would have been delayed if appelle had applied all the acceptable sheets from each shipment on one building after another so as to enclose fully one or more buildings as soon as possible, prevented appellee from sustaining its burden of proof on the delay issue. This determination, however, is unrelated to the issue of whether appellee was required to change its work plan and incur increased

costs in completion of the project because of the defective plywood.

Appellant's next claim is that the findings made by the court of the damages for disruption to appellee's plan of work are not supported by the evidence. This finding is likewise fully supported by the evidence.

The trial court found that appellee's "plan of work provided that the plywood on the second story may be applied to the framing while it was lying on the deck in a horizontal position. Thereafter the wall sections were to be raised to a vertical position by the use of hydraulic jacks. This technique accelerated construction and was an economical method of erecting the second story framing and siding. Building 846, 847, and 848 were constructed in this manner. By reason of the fact that the plywood siding supplied by defendant did not meet contract specifications, it became necessary for plaintiff to revise its plan of work by erecting the framing and thereafter applying the plywood siding by craftsmen working from scaffolding." (Finding No. 32).

There was ample evidence to support the finding that because the defective material the job plan had to be radically altered. Billimek testified that constant sorting of plywood was required, carpenters had to be shifted about to prevent their being discharged and rehired, and re-handling and transportation of the materials throughout the site was necessary. (Tr. 159, 168, 184, 189-190, 209, 210). See also Finding No.

34-A. Second story walls were raised without siding to utilize the crews and keep the job progressing while awaiting further shipment. (Tr. 189).

Appelle contends that on the basis of this finding the court should have awarded damages only for the loss of efficiency in applying the plywood to the second story, not to the foundation and the first floor. (Appellant's brief, p. 6-7, 12-14). This argument overlooks the increased costs to appellee in applying the two lower tiers as set forth in Finding 34-A. Appellee's job superintendent, a construction man of long experience, (T. 104-105), testified that because of the large percentage of defective sheets the shipments had to be stockpiled and sorted prior to use. (T. 187). This required the time of two laborers, a carpenter foreman, a teamster and a fork lift part time. (T. 187). After sorting, the acceptable sheets had to be loaded on a truck and delivered from the stockpile to the area on the site where the material was being used at the time. There it was unloaded and moved into position where it could be handled by carpenters. Some sheets had to be cut or sawed into half. Order Supplementing Findings of Fact, Finding No. 34-A. All of these additional costs, none of which were disputed by appellant, were required for the installation of the entire remaining 1300 sheets.

In addition, it is also undisputed that appellee was unable to install the second floor siding by use of the tilt up method. (Finding No. 32, T. 189). This was

costly because instead of being able to nail the sheets to the framing on the ground, application from scaffolding was required. It necessitated the renting of scaffolding, laborers handing the 4′x8′ sheets to carpenters, nailing from scaffolding, and extra handling for cutting and fitting adjacent to windows. (Finding No. 34-A). Contrasted with appellee's initial plans for application of the siding, a plan found to have been highly successful on a similar project the preceding year, the technique used was clumsy, inefficient, and costly. In addition, as testified by Billimek, a general disruption of the work plan occurred. (T. 184, 189). In fact, he said that rejection of much of the second shipment "upset everything we had planned at that stage." (T. 184). The crew, he said, was not organized and when they went to work in the mornings "they just put their overalls on and worked instead of being told what to do." (T. 247).

Appellant further complains that the method used by the trial court in computing appellee's damages were not supported by the evidence. The court found that as a result of the changes required in appellee's work plan for the installation of the second floor siding, its costs were increased about three times. (Finding No. 32). This finding was based on the testimony of Billimek that "if we could have applied the siding the way we had it planned, in order to have the walls laying down and applying the siding, the way we had to do it cost us about three times as much. (T. 247-248). Notice that the testimony related to

"the siding." It was not limited to "second story siding." The court was warranted in inferring that the testimony referred to related to the overall siding costs. He further testified, however, that the overall loss of labor efficiency was about 20%. (T. 247). No award was made for this item even though the testimony was not disrupted. The court no doubt, however, took such testimony into consideration in arriving at its overall findings.

The monetary award was computed as shown in Finding Nos. 33 and 34. The court found that three manhours per sheet were required to install the 1300 sheets in the replacement shipments. Appellee's costs per man hour were found to be $10.00, a figure not disputed by appellant.

The finding that three man hours were required to apply a sheet of plywood to the end of a building is supported by the testimony of appellee's superintendent, Ex. - I. Billimek T. 333. He testified that in one day a (five man) group with that type of building should probably *cover* 20 or 25 feet down one side of the building. The interrogation on cross-examination continued:

"Q. Well how many sheets during a 9 hour period, how many sheets could they put up and remove?

"A. Well, there are half sheets, and I don't know how many sheets it would take. You are talking about sheets. Maybe it would take a small piece that would have to be cut and fitted. It takes longer to put that on than a full sheet.

I think they should *cover* that building between 20 and 25 feet down one side, either the side of the building or the back. The ends would be faster as there are no windows, but that's an average on the side of the building. (Emphasis supplied.)

"Q. How long would it take to do one end of a building?

"A. They should complete one end, that crew that we mentioned awhile ago should complete one end in one day. Of course the ends are simple, they are all full sheets. And that's under good working conditions.

"Q. Pardon?

"A. That's under good working conditions.

"Q. That's 18 sheets on the ends, plus the other material, is that right?

"A. Yes.

"Q. So that four men in nine hours, maybe they could do . . .

"A. We are talking about five men, weren't we?

"Q. Let's add another one in there then. Let's say five, and that would be about 45 man hours and we should do at least 15 sheets. That's about three man hours per sheet. That's a pretty healthy estimate, isn't it, Mr. Billimek?

"A. Under certain conditions it's not bad."

Although appellant contends that Billimek's estimates were directed to removing and replacing siding, it is apparent that the testimony related solely to placing the siding. This is evident from the witnesses' testimony that the group should cover one side of a building down 20 to 25 feet in one day and complete one end in one day. While the question

called for an estimate of the number of sheets which a five-man group could remove and replace in one day, the answer clearly was phrased in terms of the area which could be covered in one day.

The answer was obviously satisfactory since no objection was made by the cross-examiner that it was not responsive. Nor was the subject pursued further. In light of the witness's testimony and his demeanor and inflections of voice and expression at the time of relating it, as observed by the trial court, the court was warranted in finding that the testimony related to the time required to install plywood, and not to its removal and reinstallation.

At the very least the testimony is ambiguous. It was therefore the province of the trial court to resolve the ambiguity. "The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on review only if 'clearly erroneous'." *United States v. National Assoc. of Real Estate Boards,* 339 U.S. 485, 495, 496, 94 L.Ed. 1007, 1016, 70 S.Ct. 711 (1950); *Guzmen v. Pichirilo,* 369 U.S. 698, 702, 8 L.Ed.2d 205, 209, 82 S.Ct. 1095 (1963).

Determination of the ambiguity, if any, in the Billimek testimony was resolved against appellant by the trial court, and its findings were not "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure.

Certainly one cannot say with respect to any of the findings challenged one "is left with the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L.Ed 746, 765, 68 S.Ct. 525 (1948). From the trial judge's carefully prepared findings it is apparent that he carefully considered and weighed the evidence. This is further reason for giving them the full benefit of the presumption that they are supported by the evidence.

Moreover, with respect to the damages awarded, substantial latitude is allowed. Here the fact of damage is certain. The basis of appellant's complaint is that the amount of damage has not been determined with mathematical precision, that it is the product only of opinion. This, however, is not insufficient. As this court remarked in *Kupoff v. Stepovich,* (9th Cir. 1958) 261 F.2d 693, a case arising in Alaska, quoting from *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 11 L.Ed 684, 47 S.Ct. 400, "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." Under such circumstances, it is enough "if there is a basis for a reasonable inference as to the extent of damages. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 90 L.Ed. 416, 66 S.Ct. 91. Absent Alaska decisions on the question, this court

should apply the general rule that "a trial court has wide discretion in determining the amount of damages for breach of contract," *Distillers Distributing Corp. v. J. C. Millet Co.,* (9th Cir. 1963), 310 F.2d 162, applying California law; *Robert E. McKee General Con., v. Insurance Co. of No. America,* (10th America Cir. 1959), 269 F.2d 195, applying New Mexico law; *Walla Walla Post District v. Palmberg,* (9th Cir. 1960), 280 F.2d 237, applying Washington law; 78 A.L.R. 858.

Unquestionably appellee's damages were difficult to determine. Much evidence was introduced on the issue, and the trial court unquestionably was faced with a difficult and complex task in arriving at a dollar award of damages. Yet it is apparent from the Court's Memorandum to Counsel and Order that the Court endeavored to achieve an award "which would be fair and just between the parties." As respects the appellant, the damages are fair and just and are based upon reasonable inferences as to the extent of appellee's loss. Appellant's seemingly reckless disregard of its contractual obligations hardly entitle it to complain that the damages for its irresponsible conduct cannot be measured with precision. The fact of damage is certain, and the award, under all the circumstances, was based upon a dispassionate and carefully reasoned analysis of all the evidence

COSTS:

Appellee was entitled to its costs in the discretion

of the lower court under Rule 54(d), Federal Rules of Civil Procedures. Since judgment was rendered in appellee's favor it was the "prevailing party," *Bentley v. Sunset House Distributing Co.,* (9th Cir. 1966), 359 F.2d 140, 6 Moore's Federal Practice 1305, §54.70(4).

The costs taxed were proper under 28 U.S.C. 1920. They were limited to fees of the Clerk and Marshal, 28 U.S.C. 1920(1); fees of the court reporter, 28 U.S.C. 1920(2); witness fees as fixed by 28 C.F.R. 21.3, 28 U.S.C. 1920(3); and for copies of detailed construction plans for the project, 28 U.S.C. 1920(4). No showing has been made that the amounts taxed are improper. In absence of an affidavit by appellant challenging the validity of the cases allowed, it is in no position to object. *Swan Carburetor Co. v. Chrysler Corp.,* (6th Cir. 1945), 149 F.2d 476. Finally, no citation of authority should be required for the preposition that appellant is not in a position to object to the items in the cost bill which were disallowed.

CONCLUSION

The judgment should be affirmed. The findings are in no sense "clearly erroneous." The damages, difficult to express in monetary terms due to the numerous and complex operations involved, were fair and reasonable. The measure of appellant's culpability is so great that appellant should not now be heard to complain that the trial judge was required to arrive at his damage award on the basis of a time and motion study. The trial judge made the award on the basis of the best evidence available. This is sufficient.

The protest of the cost bill is specious. Costs awarded were permissible by statute. Complaint may not be made on appeal as to costs disallowed.

Respectfully submitted

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

s/ Charles E. Cole
Attorney for Appellee